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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 22

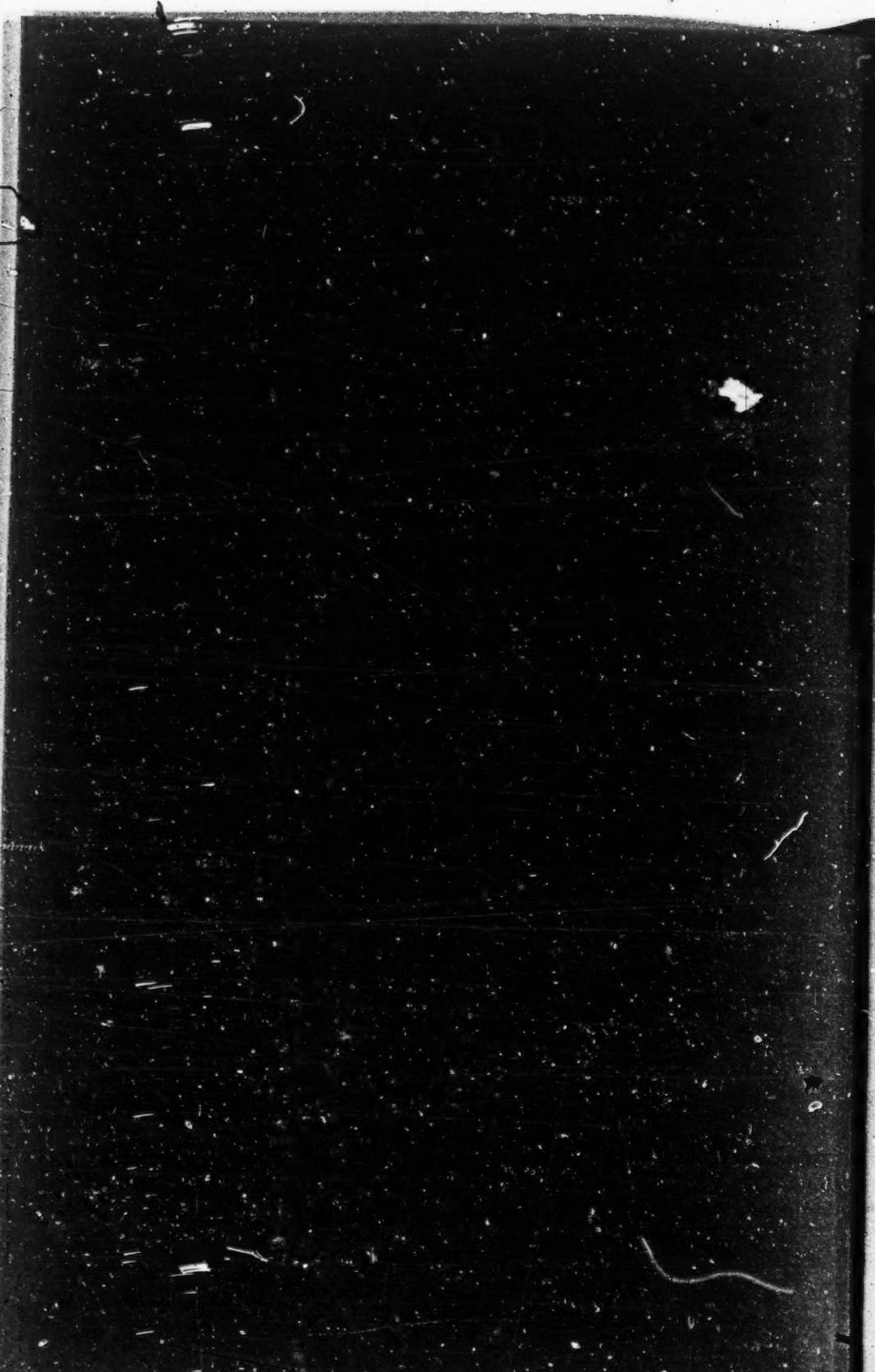
THE UNITED STATES OF AMERICA, PETITIONER

vs.

**CONTINENTAL NATIONAL BANK AND TRUST COMPANY,
TRUSTEE UNDER THE LAST WILL AND TESTAMENT
OF JAMES DUGGAN, DECEASED, ET AL.**

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE SEVENTH CIRCUIT**

**PETITION FOR CERTIORARI FILED APRIL 5, 1938
CERTIORARI GRANTED MAY 16, 1938**



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 22

THE UNITED STATES OF AMERICA, PETITIONER

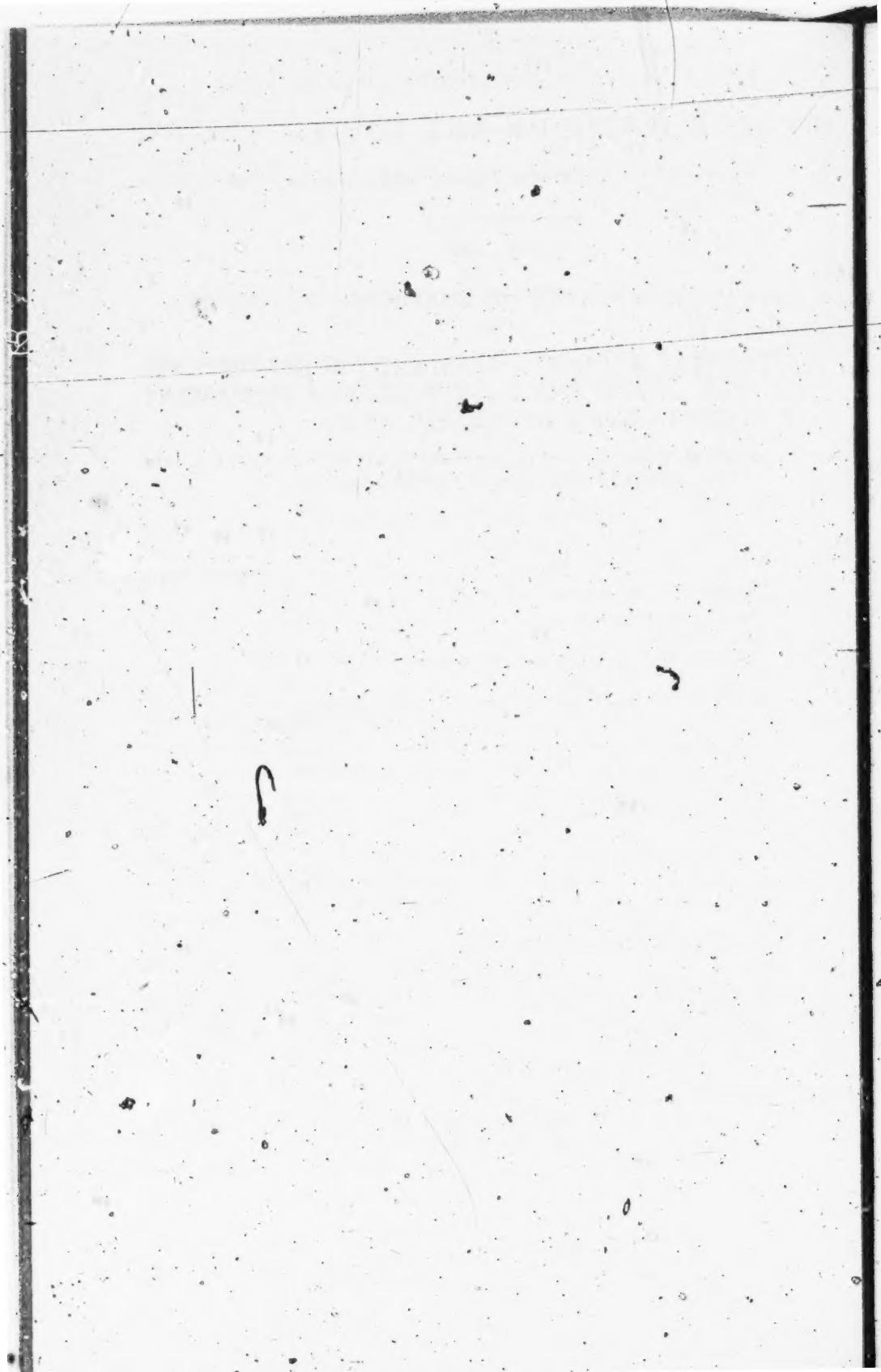
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[Placita omitted.]

In United States District Court, Northern District of Illinois,
Eastern Division

No. 11769

UNITED STATES OF AMERICA

vs.

CONTINENTAL NATIONAL BANK AND TRUST COMPANY, TRUSTEES UNDER
LAST WILL AND TESTAMENT OF JAMES DUGGAN, DECEASED, ET AL.*Bill of complaint*

Filed May 6, 1932

To the Honorable Judge of the District Court of the United States
for the Northern District of Illinois:The plaintiff by its attorney, George E. Q. Johnson, United States
Attorney for the Northern District of Illinois, complains of the
above-named defendants and respectfully shows to the court:

I.

That at all times hereinafter mentioned the plaintiff was and now
is a corporation sovereign and body politic.

II

That the defendant Continental National Bank and Trust Company
is a corporation organized and existing under the laws of the State
of Illinois, with its principal office in Chicago, Illinois; and as such
is engaged in the banking and allied activities, and particularly
acting as fiduciary to varied interests, being thereto authorized
by its charter provisions. That under the last will and testa-
ment of the late James Duggan of the County of Dade, in the State
of Florida, said defendant is appointed and designated trustee under
Items (3) and (6) of said will for the purposes and with the powers
herein set out.

III

That the defendant Henry Duggan is a brother of the late James
Duggan and a distributee of his estate, being the person mentioned
in Item (2) of said last will and testament, and as such distributee
received the sum of \$50,000.00; that said Henry Duggan is further
beneficiary of said estate under the terms of Item (7) in said will,
based upon the contingencies therein set out; that said Henry Duggan
is a resident of the State of Illinois and City of Chicago, and lives
within the jurisdiction of this Court.

IV

That the defendant Timothy Duggan is a cestui que trust and beneficiary under the last will and testament of the said James Duggan, specifically mentioned and provided for in Item (4) of said will; that the defendants Ramona Duggan, Martha Duggan, and Eugene Duggan are the children of the said Timothy Duggan and contingent beneficiaries and cestui que trustent under Item (4) of said will; that the said Martha Duggan and Eugene Duggan are minors without legal or testamentary guardian; and that all of said defendants mentioned in this said section are residents of the State of Illinois, living within the jurisdiction of this Court.

V

That the defendant Catholic Charities of the Archdiocese of Chicago is an eleemosynary corporation organized and existing under the laws of the State of Illinois, with its principal place of business and operation in the City of Chicago; and is a contingent beneficiary and cestui que trustent under Item (4) of the last will and testament of the said James Duggan.

4

VI

That James Duggan, resident of County Dade and State of Florida, died in March 1929, leaving his last will and testament which was duly filed and admitted to probate, and recorded in the county judge's court in and for Dade County, State of Florida; and Michael Duggan, the executor therein named having died prior to the death of James Duggan, the Biscayne Trust Company, a corporation of Miami, Florida, was duly appointed and qualified as executor of said will; that thereafterward the said Biscayne Trust Company became financially involved and was placed in the hands of a receiver and was formally dismissed as executor of said estate, and Lee C. Robinson was appointed and qualified as administrator de bonis non cum testamento annexo of said estate, on the 15th day of September 1930. A copy of said will is hereto attached, marked Exhibit "A," and is asked to be considered for all intents and purposes part and portion of this bill of complaint.

VII

That prior to his death, James Duggan was engaged in various enterprises, and during the years 1919 and 1920, was the chief owner and stockholder of Johnston City and Big Muddy Coal and Mining Company, an Illinois corporation, engaged in the business of mining and selling coal; that said Johnston City and Big Muddy Coal and Mining Company owned a subsidiary corporation known and designated as the Johnston City Coal Company, the said corporation being

organized under the laws of the State of Illinois and being affiliated with and owned by the said Johnston City and Big Muddy Coal and Mining Company; that for the calendar year 1920, the said Johnston City and Big Muddy Coal and Mining Company and the Johnston City Coal Company filed their consolidated income and profits tax returns on May 16, 1921, showing a tax due of \$5,269.21 which was paid; that subsequent and additional returns were filed by said corporations on February 11, 1922, showing additional taxes due, but none of said returns were correct and proper according to law; that while purporting to reflect the true condition of the business of said corporations and to give a correct and true statement of the gain, profits, and income from all sources received by or accrued to said corporations during the calendar year 1920, the said returns were in fact inaccurate, incorrect, and false in that they did not disclose the true profits and income nor show the true tax liability as required by law, whereupon, it became necessary for the Commissioner of Internal Revenue to investigate the books and affairs of said corporations, said investigation extending over a period of considerable time; that as a result of said investigation a deficiency in tax was determined by the Commissioner of Internal Revenue to the amount of \$316,620.61, and a sixty-day letter was sent to the taxpayer on December 16, 1924 in conformity with the statute properly applicable thereto; that no appeal was taken to the United States Board of Tax Appeals, and on the January 1925 list, O 3 C, Sp. 3, the same was duly assessed according to the determination made by the Commissioner, and no part of the said tax has been paid.

VIII

That during the years 1920 and 1921 the Johnston City and Big Muddy Coal and Mining Company was in a state of dissolution and as the result of the same, all of its assets were converted into cash and in commercial securities, under the direction of James Duggan, president and chief stockholder of said corporation, and the said James Duggan received and kept in his charge and possession assets of the corporation to the amount of \$295,331.64 and converted the same to his use and purposes without payment or rendering value therefor in return to the corporation, and without paying off and discharging the obligations of the said Johnston City and Big Muddy Coal and Mining Company due the Government of the United States for income and profits taxes as aforesaid. Plaintiff avers and alleges the said James Duggan received said assets impressed with a trust in favor of the United States for the payment of its tax account due by the Johnston City and Big Muddy Coal and Mining Company to the extent and value of the assets so received, which said trust has never been discharged or obviated. That having received said assets in the nature and form of funds and negotiable securities, the said James Duggan commingled and mixed the same with his own individual estate in such way that same could not be readily made sep-

arable or distinguishable, and in such way as to impress his own estate with the said trust to the extent and value of the assets so received from the Johnston City and Big Muddy Coal and Mining Company, as herein described and set out.

That the outstanding tax account of the said Johnston City and Big Muddy Coal and Mining Company remaining unpaid, and the corporation having been dissolved on December 29, 1921; without available assets in its possession for the payment of said tax account, and there being no assets or property whatsoever of said corporation against which restraint could be made, the Commission of Internal Revenue, on April 15, 1926, by registered letter notified James Duggan that under the provisions of Section 280 of the Revenue Act of 1926 there was proposed for assessment against him the sum of \$295,331.64, constituting his liability as transferee of the assets of the Johnston City and Big Muddy Coal and Mining Company of Chicago, Illinois, for an unpaid balance of \$316,488.71, representing income and profits taxes assessed against that corporation for the taxable year 1920. The details of the proposed assessment were set forth in an attached statement and mailed to said James Duggan, notifying him further that he was allowed sixty days from the date of the mailing of the letter within which to file a petition for the redetermination of the deficiency in tax. Thereafterward, upon receipt of said letter and pursuant to the notice sent, the said James Duggan filed a petition before the United States Board of Tax Appeals on June 11, 1926, wherein he protested the assessment of said tax, and upon answer filed by the Commissioner of Internal Revenue, the issue was joined for determination by the United States Board of Tax Appeals. After due consideration and after hearings and orderly proceedings, had before said Board of Tax Appeals, on January 27, 1931, an order of redetermination was made and decided by the United States Board of Tax Appeals, wherein the said James Duggan's liability as transferee in respect of income and excess profits taxes of said Johnston City and Big Muddy Coal and Mining Company for the calendar year 1920 was fixed at \$295,331.64 with interest thereon, as provided by law, from December 6, 1924. That six months thereafterward, in accordance with the provisions of law, no petition for review having been filed in the case, and no appeal having been taken therefrom, the said order of redetermination became final, and the obligation of said James Duggan to the plaintiff was duly established whereby he became liable for the payment of the outstanding tax account of the Johnston City and Big Muddy Coal and Mining Company in the said amount of \$295,331.64, as aforesaid, no part of which has been paid, and which is now due to the plaintiff United States of America, without offset credit or counterclaim. A copy of said order of redetermination by

The United States Board of Tax Appeals is hereto attached, marked Exhibit "B", and is asked to be considered as a part and portion of this section of the bill of complaint.

X

That James Duggan died in March 1929 being domiciled in Dade County, State of Florida, as aforesaid, leaving an estate worth approximately the sum of \$1,500,000.00 after payment of administration fees, costs, expenses, and the payment of creditors other than plaintiff; that as hereinbefore set out the said estate in due course came into the hands of Lee C. Robinson, administrator de bonis non cum testamento annexo, who had actual notice and knowledge of the tax account owing by said James Duggan to the plaintiff according to the order of redetermination made by the United States Board of Tax Appeals as aforesaid; and who in addition thereto had knowledge of the same through proof of claim filed with him on April 24, 1931, by the plaintiff, prior to the final settlement of the estate, through its duly accredited agents and officials; but regardless of said notices and in violation of plaintiff's rights, the said Lee C. Robinson turned over to defendant Henry Duggan the sum of \$50,000.00 bequeathed under Item (2) of the will of James Duggan, and to the defendant Continental National Bank and Trust Company all the rest, residue, and remainder of said estate of the total value of \$1,500,000.00, and the said defendant Continental National Bank and Trust Company, and said Henry Duggan received the same as distributees under said will without value or consideration other than the terms of said will.

XI

That aside from the \$50,000.00 turned over to defendant Henry Duggan, the defendant Continental National Bank and Trust Company, as trustee under the said will, has now in its possession the entire corpus of said estate and plaintiff alleges and avers that both the defendant Henry Duggan and the said Continental National Bank and Trust Company, and all the beneficiaries under the terms of said will, holding or claiming any interest whatever in said estate, received and hold same charged with a trust, superior and controlling over any distribution made by the said testator in his said will, in favor of the plaintiff for the payment of said outstanding tax account as redetermined by the United States Board of Tax Appeals, and that plaintiff is entitled in equity to have an accounting for said assets, and that out of same should be paid the tax account aforesaid.

XII

That this is a suit in equity by the United States of a civil nature arising under a law of Congress providing for internal revenue; and

plaintiff has no clear, adequate, or complete remedy at law against the Johnston City and Big Muddy Coal and Mining Company, or the defendants herein named, nor has the plaintiff any clear, adequate, or complete, or certain remedy against any other persons or corporations through or by which said tax may be collected; and therefore plaintiff brings this suit. That it is useless and vain to proceed against the Johnston City and Big Muddy Coal and Mining Company for judgment or against the estate of the said James Duggan, for that the said Johnston City and Big Muddy Coal and Mining Company has been dissolved and the entire assets of the estate of said James Duggan have been distributed to the defendants as aforesaid.

XIII

That the Commissioner of Internal Revenue authorizes and sanctions these proceedings.

Wherefore, premises considered, the plaintiff comes before this Court and prays:

1. That this Honorable Court order, adjudge, and decree that there is due the plaintiff by James Duggan or his estate the sum of \$295,831.64 with interest thereon as provided by law, from December 6, 1924, the same being due by reason of the fact that the said James Duggan was transferee of the assets of the said Johnston City and Big Muddy Coal and Mining Company in said amount.

2. That this Honorable Court order, adjudge, and decree that the defendants and each of them be accountable to the plaintiff for the aforesaid taxes, with interest and penalties as prescribed by law, to the extent of the amount distributed to and received by them and each of them from and of the assets of the estate of the said James Duggan or to the extent of any amount held in trust for their use and benefit and the income therefrom; and that the said defendants be ordered to pay to plaintiff to the full extent of the amounts distributed to them or held for them in trust until the debt due to plaintiff by the estate of the said James Duggan for taxes as aforesaid be fully paid and discharged.

3. That the plaintiff have such other and further relief as is just and equitable, including a decree for costs.

And may it please the Court to grant unto the plaintiff a writ of subpoena to the United States of America issued out of and under the seal of this Honorable Court directed to the above-named defendants and commanding them on a day certain and under certain penalties therein expressed personally to appear before this Honorable Court then and there to answer all and singularly the premises, answer under oath being expressly waived, and to stand to and perform and abide by such orders, directions, and decrees as may be made against them in the premises; and further that guardians ad litem be appointed according to law to represent and litigate the

questions at issue in behalf of the defendants Martha Duggan and Eugene Duggan, minors as aforesaid, and the plaintiff will ever pray, etc.

(s) GEORGE E. Q. JOHNSON,
United States Attorney for the Northern District of Illinois.

Exhibit "A" to bill of complaint

Copy

I, James Duggan, of the County of Dade and State of Florida, being of sound mind and memory, and of disposing capacity, do make, publish, and declare this instrument as and for my Last Will and Testament, hereby revoking any and all former Wills by me at any time made.

(1) I order and direct that all my just debts and funeral expenses be paid as soon as is possible after my decease by my Executor hereinafter named.

10 (2) I give and bequeath unto my brother, Henry Duggan, the sum of Fifty Thousand (50,000) Dollars.

(3) I give and bequeath unto the Continental National Bank and Trust Company of Chicago, a corporation organized under the laws of the United States of America, as Trustee, the sum of Fifty Thousand (50,000) Dollars.

(4) The net annual income from the said trust estate shall be paid by said Trustee in quarterly installments unto my brother, Timothy Duggan, and such payments of income shall so continue to be made unto him as long as he may live. Upon the death of the said Timothy Duggan, should he be survived by child or children, the said trust shall continue for the benefit of said child or children and the net annual income shall be paid to and equally divided among said children. Upon the attainment of the age of thirty (30) years by the youngest of the children of said Timothy Duggan now living, the said trust shall cease and determine and the trust fund and estate at said time in the hands of said Trustee shall be paid to and divided equally among the children of said Timothy Duggan living at the time of such determination of the trust, the child or children of any deceased child, however, to take and receive its or their parent's share. If any of the children of said [Initials in margin—G. R. P., N. E. O., M. S. C., Page One. James Duggan (Seal)] Timothy Duggan die before such determination of the trust, the income which said deceased child would have received had it continued to live, shall be paid to and divided among the child or children of such deceased child, if any, until such termination of the trust; and if such child of said Timothy Duggan, so having died, leave no child or children, then, such income shall be divided among the other children of the said Timothy Duggan, until such termination of the trust, the child or children of any deceased child, however, to take and receive its

or their parent's share. Should the youngest child now living die before having attained such age of thirty (30) years, such termination of the trust shall be at the time of the attainment of thirty (30) years by the youngest of the now living children of said Timothy Duggan who may live to attain such age. Should the death of said Timothy Duggan occur subsequent to such attainment of such age of thirty (30) years, such termination and division shall be as at the time of the death of said Timothy Duggan. Should said

11. Timothy Duggan so die leaving no child or children surviving and no descendant or descendants of child or children, or should all such children or descendants die before the termination of the trust as hereinbefore provided, then, and in such event, upon the death of the said Timothy Duggan, or upon the death of the last to die of such children or descendants, or in no event at a later period than had been hereinbefore provided, the trust shall cease and determine and the trust fund and estate shall be paid to The Catholic Charities of the Archdiocese of Chicago, to be used by such Charities as they may see fit.

(5) Should I be survived by my brother, Michael Duggan, then, and in such event, all the rest, residue, and remainder of my estate of whatsoever kind or character, of which at the time of my death I may be seized or possessed, or in which at said time I may have any interest whatsoever, I give, devise, [Initials in margin—G. R. P., N. E. O., M. S. C. Page Two. James Duggan (Seal) and bequeath unto my brother, Michael Duggan.

(6) Should I not be survived by my said brother, Michael Duggan, then, and in such event, all such rest, residue, and remainder of my estate I give, devise, and bequeath unto the Continental National Bank and Trust Company of Chicago, a corporation organized under the Laws of the United States of America, as Trustee, in trust, however, upon the following terms and conditions:

(7) The net income from the said trust estate shall be paid unto my brother, Henry Duggan, quarterly annually, such payment of net income to accrue from the date of my death and so to continue to be made unto my said brother as long as he may live.

(8) Upon the death of my said brother, Henry Duggan, the said trust shall cease and determine and the trust estate then in the hands of the said Trustee shall be paid, transferred, and delivered over as may be designated and appointed in and by the last Will and Testament of my said brother, Henry Duggan.

(9) During the term of the said trusts created by this, my Will, the said Trustee shall hold, manage, care for, and protect said trusts and collect the income therefrom all in accordance with its best judgment and discretion. It may retain as a portion of the said 12 trust estates any investment made by me and which may be delivered to it by my Executor; hereinafter named, as payment of said bequest or of the residuary estate. Said Trustee shall

be paid a fair and just compensation for its services hereunder and shall be allowed its reasonable expenses incurred in managing and protecting said trust estates.

(10) I give unto said Trustee and unto my Executor hereinafter named, respectively, full power and authority at any time and from time to time, to sell, convey, and convert the whole or any part of my estate at such prices and upon such [Initials in margin—G. R. P., N. E. O., M. S. C. Page Three. James Duggan (Seal)] terms and to such persons as to said Trustee or said Executor shall seem proper, and at public or private sale, and also to settle and compound any claims, either in favor of or against my estate, and for the purposes aforesaid, to execute and deliver all necessary and proper conveyances, assignments, and transfers, and to give full receipts and discharges; and in case of any sale of property the purchaser shall not be required to see to the application of the purchase money. Said Executor and said Trustee are given full power and authority to make any division, distribution or partition of my estate or payment of any legacy or charge in securities, property, or cash, and for the purpose, the value which shall be placed upon any such securities or property shall be final and conclusive and such division, distribution, partition, or payment shall be binding upon all concerned.

(11) In making any investments of the said funds of the said trust estates, said Trustee shall obey the instructions of my brothers, Michael Duggan and Henry Duggan, and such instructions when so received, by said Trustee, shall be binding upon it and shall relieve it from any responsibility for such investments when so made. Other than as above indicated, the discretion of said Trustee is unlimited and after the death of both of said parties, no restrictions are placed upon it in making such investments, and such investments are left to its sole discretion. Should, however, one of said parties die, the power and authority given to both of said parties in giving instructions as to such investments shall be vested in the other, or survivor, of said parties.

(12) I desire that all Inheritance and Estate Taxes on the 13 distributive shares of or interest in my estate, levied under the laws of any state or of the United States, shall be paid by my Executor hereinafter named, out of the principal or residue [Initials in margin—G. R. P., N. E. O., M. S. C. Page Four. James Duggan (Seal)] of my estate, and said Executor shall be allowed to charge such payments as part of the expenses of the administration of my estate.

(13) The beneficiaries under this Will shall have no control over the said Trust Estates, and payments are to be made therefrom as herein directed only upon their proper personal receipts, and they shall have no right or authority to assign or anticipate any income or payment which such beneficiaries or any of them may receive or expect to receive under the provisions of this Will, and the respec-

tive interests of the beneficiaries shall not be liable in any manner or to any extent for the obligations or liabilities of said beneficiaries or for any claims against them.

(14) I direct that if any stocks or securities are retained or purchased by the said Trustee at a premium above their par value, said Trustee is relieved of any duty as to making adjustments of such premiums and is authorized to charge the corpus of the estate with such premiums. Should any securities be bought at a discount, said Trustee shall credit the corpus of the estate with the difference between the purchase price and the amount realized on the collection or sale of said securities. Stock dividends, so-called, shall not be considered as income, but shall be considered as an accretion to the principal of the trust estate. Subject to the foregoing, said Trustee may regard the whole of the interest or dividends received by it as income, and I give to the said Trustee power to determine what expenses, commissions, or charges shall be charged to income and what to principal.

(15) I nominate, constitute, and appoint my brother, Michael Duggan, as Executor of this, my last Will and Testament, and order and direct that no bond other than his personal bond be required of him as such Executor. Should my said brother not survive me or should he decline to act in such [Initials in margin—G. R. P., N. E. O., M. S. C. Page Five. James Duggan (Seal)] capacity, then and in such event, I nominate, constitute, and appoint the Biscayne Trust Company, a corporation of the State of Florida, as Executor of this, my last Will and Testament; and said Trust Company as such Executor shall be and hereby is vested with all rights, privileges, duties, responsibilities, and dispositions herein conferred upon my original Executor.

In Witness Whereof, I have hereunto set my hand and affixed my seal, at Tucson, Arizona, this 17th day of January, A. D. 1928.

[SEAL]

JAMES DUGGAN.

The foregoing instrument, consisting with this and the preceding pages of six (6) typewritten pages, was at the date thereof subscribed by the testator, James Duggan, in our presence, and was at the time declared by him to be his last Will and Testament, and we, at the same time, in his presence, at his request, and in the presence of each other, have hereunto subscribed our names as attesting witnesses, and we do hereby certify that at the time of the execution of the said Will, the said James Duggan was of sound and disposing mind, memory, and understanding.

George R. Powder, Residing at 1049 N. 2nd Ave., Tucson, Ariz.

N. Edw. Olson, Residing at Santa Rita Hotel, Scott & Broadway, Tucson, Ariz.

MaBelle S. Clarke, Residing at 110 E. 2nd St., Tucson, Ariz.

[Initials in margin—G. R. P., N. E. O., M. S. C. Page Six.]

15 *Exhibit "B" to bill of complaint*

Copy

United States Board of Tax Appeals, Washington

Docket No. 17208

JAMES DUGGAN, petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, respondent

DECISION

Pursuant to the Board's findings of fact and opinion promulgated January 6, 1930, the respondent filed a computation of the proposed tax liability on January 17, 1930. Due notice having been given in conformity with the order of the Board and the proceedings having been called for settlement from the Day Calendar of January 21, 1931, at which time there was no appearance on behalf of the petitioner or his estate, it is

Ordered and Decided: That the petitioner's liability as transferee, in respect of income and excess profits taxes of the Johnston City and Big Muddy Coal and Mining Company, for the calendar year 1920, is \$295,331.64 with interest thereon, as provided by law, from December 6, 1924.

(Signed) W. C. Lansdon, Member.

Entered January 27, 1931.

16

In United States District Court

Petition for appointment of guardian ad litem

Filed Jan. 7, 1933.

And now comes the United States of America, by Dwight H. Green, United States Attorney for the Northern District of Illinois, its attorney, and shows unto the court that one of the defendants in this cause, namely, Eugene Duggan, is a minor, and respectfully petitions the court for the appointment of a guardian ad litem for said minor defendant.

Dwight H. Green,
United States Attorney.

In United States District Court

Order appointing guardian ad litem

Jan. 7, 1933

On motion of the United States Attorney, the Court being advised in the premises, It Is Ordered that William H. Von Oosterhout be

and he is hereby appointed Guardian ad litem for Eugene Duggan, a minor.

Joint and several motion by certain defendants to dismiss bill of complaint

Filed Jan 16, 1933.

Come now defendants, Continental National Bank and Trust Company, a corporation, Trustee under the last will and testament of James Duggan, deceased, Henry Duggan, Timothy Duggan, Ramona Duggan, and Martha Duggan, by Herbert Pope, their solicitor herein, and said defendants do jointly, and each of them does severally, move the court to dismiss the bill of complaint herein upon the following grounds, to wit:

1. The bill of complaint herein fails to state facts sufficient to constitute a cause of action in favor of plaintiff against these defendants or against any of them.
2. The bill of complaint herein fails to state facts sufficient to constitute a cause of action in equity in favor of plaintiff against these defendants or against any of them.
3. If plaintiff ever had any cause of action against these defendants or against any of them by reason of the allegations of the bill of complaint herein, it appears from said bill of complaint that such cause of action was for the collection of an income and profits tax of the Johnston City and Big Muddy Coal and Mining Company for the calendar year 1920, that said company filed its income and profits tax return on May 16, 1921; that thereafter a deficiency in said tax was assessed against said company in January 1925; and that this cause cannot be maintained by plaintiff by reason of the bar of the statute of limitations contained in the provisions of section 278 of the Revenue Act of 1926 as amended.
4. If the plaintiff ever had any cause of action against these defendants or against any of them by reason of the allegations of the bill of complaint herein, it appears from said bill of complaint that this suit cannot be maintained by plaintiff by reason of the bar of the statute of limitations contained in the provisions of section 277 of the Revenue Act of 1926 as amended.
5. If the plaintiff ever had any cause of action against these defendants or against any of them by reason of the allegations of the bill of complaint herein, it appears from said bill of complaint that this suit cannot be maintained by plaintiff by reason of the bar of the statute of limitations contained in the provisions of section 280 of the Revenue Act of 1926 as amended.
6. If the plaintiff ever had any cause of action against these defendants or against any of them by reason of the allegations of the bill of complaint herein, it appears from said bill of complaint that

this suit cannot be maintained by plaintiff by reason of the bar of the statute of limitations contained in the provisions of section 311-(b) of the Revenue Act of 1928.

7. If the plaintiff ever had any cause of action against these defendants or against any of them by reason of the allegations of the bill of complaint herein, it appears from said bill of complaint that this suit cannot be maintained by plaintiff by reason of the bar contained in the applicable statute of limitations.

Wherefore, these defendants do, and each of them does, pray that the whole of the bill of complaint herein may be dismissed and that these defendants and each of them may be hence dismissed with their cost in this behalf incurred; and for such other and further relief as to the court may seem just.

Dated January 16, 1933.

CONTINENTAL NATIONAL BANK,
AND TRUST COMPANY,

*Trustee under the last will
and Testament of James Duggan, Deceased.*

HENRY DUGGAN

TIMOTHY DUGGAN

RAMONA DUGGAN

MARTHA DUGGAN

By (Signed) HERBERT POPE, Their Solicitor.

19 In United States District Court

Order extending time

Feb. 1, 1933

This cause coming on to be heard upon the motion of William H. Van Oosterhout, Guardian ad litem for Eugene Duggan, one of the defendants herein, and it appearing to the court that a motion to dismiss the bill of complaint herein is now pending.

It is, therefore, Ordered, Adjudged, and Decreed that the time for answering said bill of complaint be and the same is hereby extended to Eugene Duggan until the further disposition of the aforesaid motion to dismiss and until the further order of this court.

Enter:

JAMES H. WILKERSON, Judge.

Dated: February 1st, 1933.

In United States District Court

Order granting leave to amend bill of complaint etc.

Jan. 11, 1937

This day comes the United States of America, by the United States Attorney, and confesses the defendant's motion heretofore made to dismiss the Bill of Complaint, and on motion of the United

States Attorney, It Is Ordered that leave be and the same is hereby given the Plaintiff to amend instanter the Bill of Complaint filed herein.

Whereupon, the defendant by its attorney enters its motion to dismiss the amended Bill of Complaint, and the defendant is to file Brief in support of said motion to dismiss by February 5, A. D. 1937, Government to file Brief by February 19, A. D. 1937, and defendant to file reply brief by March 1, A. D. 1937, and defendant's motion to dismiss the Plaintiff's amended Bill of Complaint is taken under advisement.

In United States District Court

Motion for leave to amend bill of complaint

Filed Jan. 11, 1937

To the Honorable Judge of the District Court of the United States for the Northern District of Illinois:

The plaintiff, by its attorney, Michael L. Igoe, United States Attorney for the Northern District of Illinois, hereby moves for leave to amend its bill of complaint in the above-entitled cause by amending Paragraph IX thereof to read as follows:

"That the outstanding tax account of the said Johnston City and Big Muddy Coal and Mining Company remaining unpaid, and the corporation having been dissolved on December 29, 1921, without available assets in its possession for the payment of said tax account, and there being no assets or property whatsoever of said corporation against which restraint could be made, the Commissioner of Internal Revenue, on April 15, 1926, by registered letter notified James Duggan that under the provisions of Section 280 of the Revenue Act of 1926 there was proposed for assessment against him the sum of \$295, 331.64, constituting his liability as transferee of the assets of the Johnston City and Big Muddy Coal and Mining Company of Chicago, Illinois, for an unpaid balance of \$316,468.71, representing income and profits taxes assessed against that corporation for the taxable year 1920. The details of the proposed assessment were 21 set forth in an attached statement and mailed to said James Duggan, notifying him further that he was allowed sixty days from the date of mailing of the letter within which to file a petition for the redetermination of the deficiency in tax. Thereafterward, upon receipt of said letter and pursuant to the notice sent, the said James Duggan filed a petition before the United States Board of Tax Appeals on June 11, 1926, wherein he protested the assessment of said tax, and upon answer filed by the Commissioner of Internal Revenue, the issue was joined for determination by the United States Board of Tax Appeals. After due consideration and after hearings and orderly proceedings had before said Board of

Tax Appeals on January 27, 1931, an order of redetermination was made and decided by the United States Board of Tax Appeals, wherein the said James Duggan's liability as transferee in respect of income and excess profits taxes of said Johnston City and Big Muddy Coal and Mining Company for the calendar year 1920 was fixed at \$295,331.64 with interest thereon, as provided by law, from December 6, 1924. On February 14, 1931, the Commissioner of Internal Revenue made a jeopardy assessment against James Duggan, deceased, under authority of Section 279 of the Revenue Act of 1926 in the sum of \$295,331.64, representing the amount redetermined by the Board of Tax Appeals as the liability of James Duggan as transferee of Johnston City and Big Muddy Coal and Mining Company, together with interest thereon in the sum of \$109,661.09, a total of \$404,992.73, said assessment appearing on the Commissioner's February 14, 1931, List, No. 2, Page 1, Line O.

Six months after entry of the order of redetermination by the Board of Tax Appeals, in accordance with the provisions of law, no petition for review having been filed in the same, and no appeal having been taken therefrom, the said order of redetermination became final, and the obligation of said James Duggan to the plaintiff was duly established whereby he became liable for the payment of the outstanding tax account of the Johnston City and Big Muddy Coal and Mining Company in the said amount of \$295,331.64, as aforesaid, no part of which has been paid, and which is now due to the plaintiff, United States of America, without offset credit or counterclaim. A copy of said order of redetermination by the United States Board of Tax Appeals is hereto attached, marked Exhibit 'B', and is asked to be considered as a part and portion of this section of the bill of complaint."

22 The only change which it is proposed to make in Paragraph IX as amended is to insert an allegation that on February 14, 1931, the Commissioner of Internal Revenue made a jeopardy assessment against James Duggan, deceased, in the amount of \$295,331.64, representing the amount redetermined by the Board of Tax Appeals as the liability of James Duggan as transferee of Johnston City and Big Muddy Coal and Mining Company for unpaid income and profits taxes for the year 1920, together with interest thereon in the sum of \$109,661.09, a total of \$404,992.73. This amendment is necessary because the allegation that an assessment was made against James Duggan, deceased, was omitted from the original bill of complaint and is an important fact in determining whether the present action was timely brought against these defendants.

Wherefore, it is prayed that this motion be granted and that the bill of complaint be amended as prayed.

Respectfully submitted.

(s) MICHAEL L. IGOE.

United States Attorney, Attorney for the Plaintiff:

January 1937.

In United States District Court

Decree

March 22, 1937

The court having considered the briefs submitted and being now fully advised in the premises,

It Is Ordered that the defendant's motion to dismiss the amended bill of complaint be and the same is hereby sustained—to which ruling of the Court the United States of America by the United States Attorney duly excepts.

It Is Ordered Therefore, that the Plaintiff's amended bill of complaint be and the same is hereby dismissed.

23

In United States District Court

Notice of appeal

Filed June 21, 1937

To Butler, Pope, Ballard & Elting, Herbert Pope, and Benjamin M. Price, 120 South La Salle St., Chicago, Illinois:

The plaintiff, the United States of America, hereby serves its notice that it will appeal from the decision or judgment entered in the above entitled cause on March 22, A. D. 1937.

M. L. Igoe (B)

MICHAEL L. IGOE,

United States Attorney.

Received a copy of the above and foregoing Notice of Appeal this 19th day of June, A. D. 1937.

BENJAMIN M. PRICE,
Attorney for Defendants.

In United States District Court

Petition for appeal

Filed June 21, 1937

To the Honorable Judges of the District Court of the United States for the Northern District of Illinois:

Now comes the United States of America, plaintiff in the above entitled action, by its attorney, Michael L. Igoe, United States Attorney for the Northern District of Illinois, as petitioner, and

24 respectfully shows that on the 22nd day of March, 1937, the Court sustained the defendants' motion to dismiss the amended bill of complaint and ordered that plaintiff's amended bill of complaint be dismissed.

Your petitioner feeling itself aggrieved by the said judgment, pursuant to the authority and direction of the Attorney General of the United States of America, herewith petitions the Court for an order allowing it to prosecute an appeal in the United States Circuit Court of Appeals for the Seventh Circuit under the laws of the United States in such cases made and provided.

Wherefore, the premises considered, your petitioner prays that an appeal in this behalf be allowed to the United States Circuit Court of Appeals for the Seventh Circuit, City of Chicago, State of Illinois, in said Circuit, for the correction of the errors complained of and herewith assigned, and that an order be entered allowing the said appeal without bond of the plaintiff, it appearing that the above entitled cause is one in which the United States is the real party in interest and that this petition for appeal is filed pursuant to the authority and direction of the Attorney General of the United States.

Dated this 21st day of June A. D. 1937.

M. L. Igoe (P).
MICHAEL L. IGOE
United States Attorney.

In United States District Court

Assignment of errors

Filed June 21, 1937

Now comes the plaintiff, by its attorney, Michael L. Igoe, United States Attorney for the Northern District of Illinois, and assigns the following errors upon which it will rely upon its appeal from the decree entered in this cause on March 22, 1937, to the United States Circuit Court of Appeals for the Seventh Circuit:

25

I

The Court erred in granting the defendants' motion to dismiss and in ordering the plaintiff's bill of complaint, as amended, dismissed.

II

The Court erred in failing and refusing to deny the defendants' motion to dismiss.

III

The Court erred in failing and refusing to hold that the plaintiff's action was timely instituted and that the prosecution of the action is not barred by any statute of limitations.

IV

The Court erred in failing and refusing to hold that the plaintiff's bill of complaint, as amended, alleges facts sufficient to constitute a good cause of action against the defendants.

V

The Court erred in not making findings of fact and conclusions of law as required by Rule 70½ of the General Equity Rules promulgated by the United States Supreme Court.

VI

The Court erred in entering its decree of March 22, 1937, dismissing the plaintiff's bill of complaint.

Wherefore, the plaintiff prays that the decree of March 22, 1937, be reversed and that judgment be entered herein in its favor upon the demands set forth in the bill of complaint in this case.

M. L. IGOE P.

United States Attorney.

D. L. BRAZELOW P.

Assistant United States Attorney.

26

In United States District Court

Order allowing appeal

June 21, 1937

This cause coming on to be heard on the petition of the United States of America, the said plaintiff appearing by its attorney, Michael L. Igoe, United States Attorney for the Northern District of Illinois, for an order allowing it to prosecute an appeal to the United States Circuit Court of Appeals for the Seventh Circuit, and it appearing that notice of this proceeding has been given to the defendants.

It Is Ordered in open court that the prayer of the said petitioner be and the same hereby is allowed, and the appeal prayed for by the said petitioner is hereby granted and allowed without bond of the plaintiff, it appearing that the above entitled cause is one in which the United States is the real party in interest, and this appeal is being taken by the direction and authority of the Attorney General of the United States of America.

Dated this 21st day of June A. D. 1937.

Enter:

CHARLES E. WOODWARD,
United States District Judge.

In United States District Court

Amended praecipe for transcript of record

Filed July 3, 1937

To Henry W. Freeman, Esq., Clerk of the District Court of the United States for the Northern District of Illinois, Eastern Division:

You will please prepare a transcript of the record in the above-entitled cause, to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit under the appeal heretofore allowed in the said cause, and include in said transcript the following:

1. Placita.
2. Complaint filed May 6, 1932.
3. Petition for appointment of guardian ad litem, filed January 7, 1933.
4. Order appointing guardian ad litem, dated January 7, 1933.
5. Joint and several motion of Continental National Bank & Trust Co., Henry, Timothy, Ramona, and Martha Duggan to dismiss.
6. Order of February 1, 1933, extending time of Eugene Duggan to answer until disposition of the motion to dismiss.
7. Motion for leave to amend bill of complaint herein, filed January 11, 1937.
8. Order entered January 11, 1937.
9. Order of March 22, 1937, sustaining defendants' motion to dismiss amended bill of complaint, and exceptions by plaintiff.
10. Notice of appeal, filed June 21, 1937.
11. Petition for appeal, filed June 21, 1937.
12. Assignment of errors, filed June 21, 1937.
13. Order allowing appeal, filed June 21, 1937.
14. Citation, filed June 21, 1937.
16. Amended praecipe for record.

The said transcript is to be prepared as required by law and the rules of the United States Circuit Court of Appeals for the Seventh Circuit.

Michael L. Igoe (T.)
MICHAEL L. IGOE

United States Attorney

Service is hereby acknowledged of a copy of the above and foregoing Amended Praecipe this 3rd day of July, A. D. 1937.

BENJAMIN M. PRICE

28 [Clerk's Certificate to foregoing transcript omitted in printing.]

[Citation in usual form showing service on Benjamin M. Price filed June 21, 1937; omitted in printing.]

[Caption omitted.]

In United States Circuit Court of Appeals, Seventh Circuit

6332

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division

THE UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

vs.

CONTINENTAL NATIONAL BANK AND TRUST COMPANY, A CORPORATION, TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF JAMES DUGGAN, DECEASED, ET AL., DEFENDANTS-APPELLEES

Minute entry of argument and submission

Nov. 1, 1937

Now this day come the parties by their counsel and this cause now comes on to be heard on the printed record and briefs of counsel and on oral argument by Mr. Fred E. Youngman, counsel for appellant, and by Mr. Herbert Pope, counsel for appellee, and the Court having heard the same takes this matter under advisement.

32 In United States Circuit Court of Appeals for the Seventh Circuit

No. 6332, October Term and Session, 1937

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division

THE UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

vs.

CONTINENTAL NATIONAL BANK AND TRUST COMPANY, A CORPORATION, TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF JAMES DUGGAN, DECEASED, ET AL., DEFENDANTS-APPELLEES

Opinion

Filed January 5, 1938

Before EVANS, SPARKS, and MAJOR, Circuit Judges

SPARKS, Circuit Judge: This appeal presents the question of the liability of the distributees under the will of James Duggan, deceased, for a tax liability alleged to have been due from him as transferee of the assets of a dissolved corporation. The Government filed

suit in equity against the testamentary trustee and beneficiaries under the will of Duggan, deceased. Its bill of complaint was dismissed, and it is from the order of dismissal that this appeal is prosecuted.

The facts relied upon to sustain the prayer for relief against the distributees were substantially as follows: James Duggan died testate in March 1929, naming the Biscayne Trust Company, of Florida, the executor of his will. Shortly after its appointment it was placed in the hands of a receiver and dismissed as executor, and on September 15, 1930, Lee C. Robinson was appointed and qualified as administrator de bonis non. During the years 1919 and '20, Duggan had been the principal owner and stockholder of the Johnson City and Big Muddy Coal and Mining Company, an Illinois corporation which with a subsidiary filed a consolidated income and profits tax return for the year 1920 on May 16, 1921, and paid the tax due thereon. An additional return was filed in February 1922, showing additional taxes due for the year 1920. Upon investigation by the Commissioner, a deficiency was determined in the amount of \$316,620, and a sixty-day letter to that effect was sent to the taxpayer on December 24, 1924. No appeal being taken from this determination, assessment was made on the January 1925 list.

During the years 1920 and 1921, the main corporation was in process of dissolution, and during the course of it, there were transferred to Duggan as president and principal stockholder, assets belonging to it in the amount of \$295,331 for which he paid no consideration. The bill alleges that these assets, in the form of funds and negotiable securities, were received by Duggan impressed with a trust in favor of the United States for the payment of the tax account due from the corporation. On April 15, 1926, the Commissioner notified Duggan of a proposed assessment against him in the amount of the funds received by him from the corporation, constituting his liability as transferee of its assets. On June 11, 1926, Duggan filed a petition before the Board of Tax Appeals protesting the assessment. After hearing, and subsequent to Duggan's death, the Board filed its order of redetermination on January 27, 1931, fixing decedent's liability as transferee at \$295,331, with interest from December 6, 1924. The bill further alleged that six months thereafter, no petition for review having been filed, and no appeal having been taken, this order became final, and a copy of it was attached to the bill of complaint. The bill further stated that Robinson, decedent's administrator, had actual notice and knowledge of the tax account owing by Duggan "according to the order of redetermination" and, in addition thereto through proof of claim filed with him on April 24, 1931, by the plaintiff prior to the final settlement of the estate.

Relief was prayed in equity against the testamentary trustee and beneficiaries for the reason that there was no adequate remedy at law against the dissolved corporation or against the estate of the decedent, the assets of which had been distributed to appellees. The

court was therefore asked to decree that there was due from Duggan or his estate the sum of \$295,331 by reason of the fact that Duggan was transferee of the assets of the dissolved corporation in 34 that amount, and that appellees, and each of them, be held accountable for the amount distributed to and received by them from the estate of Duggan.

The bill of complaint was filed against appellees on May 6, 1932. On January 16, 1933, they filed a motion to dismiss it on the grounds that it did not state facts sufficient to constitute a cause of action; that if appellant had ever had a cause of action against them by reason of the allegations of the bill it could not be maintained because of the bar of the statute of limitations contained in sections 277 and 280 of the Revenue Act of 1926, and section 311 (b) of the Revenue Act of 1928. On January 11, 1937, appellant confessed appellees' motion to dismiss the complaint, and by leave of court filed an amended bill of complaint instanter. The amended bill added only the fact that on February 14, 1931, the Commissioner made a jeopardy assessment against Duggan, deceased, in the sum of \$295,331, together with interest thereon in the sum of \$109,661, representing the amount redetermined by the Board of Tax Appeals as the liability of Duggan as transferee, said assessment appearing on the Commissioner's February 14, 1931, list.

It will be noted that nothing is said in the bill of complaint as to substitution in the proceedings before the Board of the decedent's representatives. For facts as to this we refer to a memorandum of the Board entered December 16, 1930, prior to its order of re-determination, 21 B. T. A. 740. From this we learn that on April 29, 1929, after submission of the case for decision, counsel for decedent filed with the Board his suggestion of the death of his client. On January 6, 1930, the Board promulgated its report. On January 16, 1930, the Commissioner moved the substitution of the Biscayne Trust Company, executor under the will of decedent, as petitioner in the proceeding, submitting a certified copy of letters testamentary issued to it on April 15, 1929. Substitution was ordered by the Board on January 21, 1930. Notice was thereafter sent to the Biscayne Company on February 7, 1930, of a hearing on recomputation to be held March 5, 1930. On March 1, counsel for the substituted petitioner appeared specially to move that the order of substitution be vacated. On March 5, there was further argument by both parties on the motion to vacate, and counsel for the Commissioner also argued as to the recomputation. On April 14, the order of substitution was vacated, and on April 28, on application of the Commissioner, a rule to show cause why it should not be substituted was issued against the Biscayne Company, a copy being delivered to Lee C. Robinson, its vice-president. On September 20, counsel for the Biscayne Company filed suggestion that it was no longer executor of the estate of decedent, having suspended opera-

tions June 30, and that it was understood that Lee C. Robinson was acting as administrator de bonis non. A copy of this paper was served upon the Commissioner but he took no further action with regard to the matter. Prior to the order of redetermination, notices were sent by the Board to decedent at his last known address, to Robinson, and to the Biscayne Company. Under these circumstances the Board held that it had jurisdiction to enter a valid final order in the proceeding, and thereupon, on January 27, 1931, entered its decision. The Government argues that this order of redetermination was valid and binding, and together with the jeopardy assessment made the following month, operated to fix the liability of Duggan as transferee of the dissolved corporation so that it could proceed at any time within a six-year period following the assessment to collect from anyone into whose hands the assets of the transferee had passed.

Section 277 (a) (3) of the Revenue Act of 1926 provides a five-year period of limitation for assessment of taxes imposed by certain earlier Acts.¹ Section 278 (d) as amended by section 506 of the Act of 1928 provides for a six-year period of limitation for the collection of such taxes.²

Section 280 of the 1926 Act provides a method for the assessment and collection of claims against transferred assets.³ It

will be noted that this section provides for the fixing of the liability of transferees of taxpayers, and limitations on the assessment of such liability. The parties were proceeding under this section when the transferee died. Thereafter a final order of redetermination was entered by the Board in his name, and a jeopardy assessment levied. Appellants contend that the entry of this jeopardy assessment operated to start the running of the period of limitations provided in section 278 (d) against collection, hence gave them until February 1937 to collect the liability of Duggan by suit or otherwise. We cannot agree with this contention in view of section 311 (b) of the Act of 1928 which provides as follows:

"(2) In the case of the liability of a transferee of a transferee of the property of the taxpayer—within one year after the expiration of the period of limitation for assessment against the preced-

¹ SEC. 277 (a) (3). The amount of income, excess-profits, and war-profits taxes imposed by * * * Act of 1918 * * * shall be assessed within five years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

² SEC. 278 (d). Where the assessment of any income, excess-profits, or war-profits taxes imposed by this title or by prior Act of Congress has been made (whether before or after the enactment of this Act) within the period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court (begun before or after the enactment of this Act), but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer before the expiration of such six-year period. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon.

³ SEC. 280. (a) The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this title (including the provisions in case of delinquency in payment after notice and demand,

87 ing transferee, but only if within three years after the expiration of the period of limitation for assessment against the taxpayer;—except that if before the expiration of the period of limitation for the assessment of the liability of the transferee, a court proceeding for the collection of the tax or liability in respect thereof has been begun against the taxpayer or last preceding transferee, respectively—then the period of limitation for assessment of the liability of the transferee shall expire one year after the return of execution in the court proceeding."

We think it is clear from this that Congress did not intend to allow a six-year period of limitation for the collection of each successive transfer of the liability of the original tax. It must be noted that section 278 provides for collection by distress or court proceeding but only if begun within six years after the assessment of the tax, while section 280 provides for the assessment of the liability of a transferee of property of a taxpayer in respect of the tax. The limitations of the latter section have to do only with assessment, not with collection. We think it was not intended that the six-year provision of section 278 should be read into it. No provision is made in section 280 with respect to the liability of transferees of transferees. Such provision appears for the first time in the 1928 Act, as above, and we consider that it is entirely applicable here. The question then is whether or not the proceeding against these transferees was brought within the limited period there provided.

The return of the corporate taxpayer which gave rise to the liability here sought to be collected was filed May 16, 1921. The period for

the provisions authorizing distress and proceedings in court for collection, and the provisions prohibiting claims and suits for refunds:

(1) The liability, at law or in equity, of a transferee of property of a taxpayer in respect of the tax (including interest, additional amounts, and additions to the tax provided by law) imposed upon the taxpayer by this title or by any prior income, excess profits, or war-profit tax Act.

(2) The liability of a fiduciary under section 3467 of the Revised Statutes in respect of the payment of any such tax from the estate of the taxpayer. Any such liability may be either as to the amount of tax shown on the return or as to any deficiency in tax.

(b) The period of limitation for assessment of any such liability of a transferee or fiduciary shall be as follows:

(1) Within one year after the expiration of the period of limitation for assessment against the taxpayer; or

(2). If the period of limitation for assessment against the taxpayer expired before the enactment of this Act but assessment against the taxpayer was made within such period—then within six years after the making of such assessment against the taxpayer, but in no case later than one year after the enactment of this Act.

(3) If a court proceeding against the taxpayer for the collection of the tax has been begun within either of the above periods—then within one year after return of execution in such proceeding.

(c) For the purposes of this section, if the taxpayer is deceased, or in the case of a corporation, has terminated its existence, the period of limitation for assessment against the taxpayer shall be the period that would be in effect had the death or termination of existence not occurred.

(d) (As amended by section 505 of the Act of 1928) The running of the statute of limitations under the assessment of the liability of a transferee or fiduciary shall, after the mailing of the notice under subdivision (a) of section 274 to the transferee or fiduciary, be suspended for the period during which the Commissioner is prohibited from making the assessment in respect of the liability of the transferee or fiduciary (and in any event, if a proceeding in respect of the liability is placed on the docket of the Board, until the decision of the Board becomes final), and for 60 days thereafter.

(f) As used in this section, the term "transferee" includes heir, legatee, devisee, and distributee.

assessment, therefore, ran until May 1926. Hence, unless the limitation period was suspended by the starting of a court proceeding against the taxpayer or last transferee, the assessment of the liability of the transferee of the transferee was barred after May 1929, in spite of the fact that the period of limitation for assessment against the preceding transferee did not expire until July 27, 1931, when the decision of the Board became final.⁴ While we have grave doubts as to the validity of the order of redetermination entered ex parte by

the Board, January 27, 1931, almost two years after the Government had knowledge of Duggan's death, we do consider that under the provision of amended section 280 (d) the period of limitation against the assessment of the liability of Duggan did not expire until that order became final. See American Equitable Assur. Co. v. Helvering, 68 F. (2d) 46. However, we construe section 311 (b) to mean that the liability of the transferee of a transferee may be assessed within one year after the expiration of the period of limitation for assessment against the preceding transferee only if within three years after the expiration of the period for assessment of the taxpayer, and that only a court proceeding against the taxpayer or preceding transferee brought before the period expires as to them can keep alive rights against a subsequent transferee, and then only for a limited time. It is unnecessary for us to determine here whether, upon a showing that the estate had been closed prior to the expiration of the period for assessment, so that suit against the estate would be futile, a suit against distributees brought within that period would be effective to keep alive the liability as against those distributees. Here the suit was started almost ten months after the expiration of the period for assessment of Duggan, and the fact that a jeopardy assessment was made within the period does not render these transferees liable for its payment in the absence of a court proceeding started before the expiration of the period of limitation for assessment of the preceding transferee. It follows that the bill of complaint did not set up a good cause of action, hence, was properly dismissed.

Decree affirmed.

⁴Section 1005 (a) of the 1926 Act provides that the decision of the Board shall become final upon the expiration of the time allowed for filing a petition for review, which under section 1001 (a) of that Act is fixed at six months.

39 In United States Circuit Court of Appeals

6332

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division

THE UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

48.

CONTINENTAL NATIONAL BANK AND TRUST COMPANY, A CORPORATION, TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF JAMES DUGGAN, DECEASED, HENRY DUGGAN, MARTHA DUGGAN, TIMOTHY DUGGAN, RAMONA DUGGAN, EUGENE DUGGAN, THE LAST TWO NAMED BEING MINORS; AND THE CATHOLIC CHARITIES OF THE ARCHDIOCESE OF CHICAGO, A RELIGIOUS CORPORATION, DEFENDANTS-APPELLEES.

Judgment

January 5, 1938

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof: It is now here ordered, adjudged and decreed by this Court that the Decree of the said District Court in this cause be and the same is hereby affirmed.

40 [Clerk's certificates to foregoing transcript omitted in printing.]

42 Supreme Court of the United States

Order allowing certiorari

Filed May 16, 1938

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Endorsement on cover:] File No. 42415. U. S. Circuit Court of Appeals, Seventh Circuit. Term No. 22. The United States of America, Petitioner, vs. Continental National Bank and Trust Company, Trustee under the last will and testament of James Duggan, Deceased, et al. Petition for a writ of certiorari and exhibit thereto. Filed April 5, 1938. Term No. 22 O. T. 1938.



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